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No. 91-1370

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1991

MABEL A. KING,
Petitioner,

v.

JAMES F. PALMER, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, et al.,
Respondents.

OPPOSITION TO MOTION FOR EXPEDITED BRIEFING
ON PETITION FOR CERTIORARI

The District of Columbia, which is for all purposes the respondent in this case, opposes petitioner's belated motion to expedite briefing in this case so that it may be heard with City of Burlington v. Dague, No. 91-810 (cert. granted, January 27, 1992). Dague is now scheduled for argument on April 21, a little over six weeks from now, and there is nothing in the nature of this case, which involves a dispute over attorney's fees, that warrants expedition.

Furthermore, the principal ground offered by petitioner for asking this Court to hear this case, in addition to Dague, is that "the record in this case lays out the contingency enhancement issue in a factual depth and breadth not available in Dague, and thus offers the better vehicle for resolution of the legal question that is presented in both Dague and this case." Motion at 2.

The District disagrees. In its view, the fundamental legal issue before this Court in Dague is whether Congress authorized risk enhancement in the more than 100 fee-shifting statutes it has enacted that allow a reasonable attorney's fee to be awarded to a party who prevails in litigation. This is an issue that this Court may properly resolve by examining the language and structure of the fee-shifting provisions of these statutes, in accordance with its "judicial role . . . to reconcile competing rights that Congress has established and competing interests that it normally takes into account." Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 764 n.4 (1989). As matters now stand, fee-shifting is virtually one-way and tilted in favor of plaintiffs; and counsel for plaintiffs who prevail are entitled to recover fees at market rates for all the time they have reasonably expended on the case. The legal issue before this Court in Dague is whether Congress intended to tilt this balance even further in favor of plaintiffs by permitting fees to be awarded because plaintiffs may not or do not prevail, even though the typical fee-shifting provision permits fee awards only to prevailing parties and even though such provisions do not make what are plainly legislative judgments about when any risk enhancement should be awarded, to whom, and how it should be calculated.

The "dozens of affidavits" (King Cert. Pet. at 3) submitted by attorneys in this case are not going to assist this Court in resolving this issue. Except for the evidence such affidavits provide that risk enhancement is not needed to ensure that

persons with meritorious claim are able to secure counsel, they are, as the court below found, anecdotal and self-interested in motivation. King Cert. Pet. App. 15a-16a, citing Department of Labor v. Triplett, 494 U.S. 715 (1990). In those respects, they do not differ from the five submitted in Dague, and although there are more of them, this is hardly significant in view of the fact that there are far more attorneys in Washington, D.C., than there are in Burlington, Vermont.

As a consequence, the District believes that this case should be held in abeyance. If the Court should conclude, after briefing and argument in Dague, that resolution of the legal issue in Dague somehow requires de novo review of the particular facts of King, this Court can grant certiorari and hear this case along with Dague next Term. In this way, the factual record in this case, as well as the legal issues, can be properly briefed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused on this 5th day of March, 1992, a true copy of the foregoing Opposition to Motion for Expedited Briefing on Petition for Certiorari to be "faxed" to Roger E. Warin, Esquire, and to be mailed to him, first-class, postage prepaid, at Steptoe & Johnson, 1330 Connecticut, N.W., Washington, D.C. 20036.

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